# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD SAN FRANCISCO DIVISION OF JUDGES

HOSPITAL OF BARSTOW, INC. d/b/a BARSTOW COMMUNITY HOSPITAL

and

Case 31-CA-090049 31-CA-096140

CALIFORNIA NURSES ASSOCIATION/ NATIONAL NURSES ORGANIZING COMMITTEE (CAN/NNOC), AFL-CIO

Juan Carlos Gonzalez, for the General Counsel.

Don T. Carmody and Carmen M. DiRienzo for the Respondent.

Micah Berul, Nicole Daro and M. Jane Lawhon for the Union.

#### **DECISION**

#### Statement of the Case

Jay R. Pollack, Administrative Law Judge. I heard this case in trial at Barstow, California, on June 18-20, 2013 and at San Francisco, California, on June 27, 2013. On September 26, 2012, California Nurses Association/National Nurses Organizing Committee (CNA/NNOC), AFL-CIO (the Union) filed the charge in Case 31-CA-090049 alleging that Hospital of Barstow, Inc., d/b/a Barstow Community Hospital (Respondent) committed certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). On October 9, 2012 the charge was amended. On December 27. 2012, the Acting Regional Director for Region 31 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(5) and (1) of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing. On January 10. 2013, the Union filed the charge in Case 31-CA-096140 against Respondent. On April 30, 2013 the Regional Director issued a consolidated complaint against Respondent. Respondent filed a timely answer to the complaint, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of the parties, I make the following.

### Findings of Fact

#### I. Jurisdiction

5

10

The Respondent is a corporation, with an office and principal place of business in Barstow, California, has been engaged in the operation of a hospital providing medical care. In the twelve months prior to the issuance of the complaint, Respondent, in conducting its business operations, derived gross revenues in excess of \$250,000. Further, Respondent received goods and services valued in excess of \$5,000 directly from points outside the State of California. Accordingly, Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

15

The Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. Alleged Unfair Labor Practices

20

Respondent operates an acute care hospital in Barstow, California. The Union was certified to represent the following bargaining unit on June 29, 2012

25

All full time, and part-time, and per diem Registered Nurses, including those who serve as relief charge nurses, employed by the Respondent at its 555 South Seventh Avenue, Barstow, California facility; excluding all other employees, managers, confidential employees, physicians, employees of outside registries, and other agencies supplying labor to the Respondent, already represented employees, guards and supervisors as defined in the Act, as amended.

30

Respondent has a policy entitled "Event and Government Reporting" which ensures policies are in place to improve patient care and safety. Pursuant to that policy, employees are instructed to fill out an event report form, also referred to as an incident report, if something noteworthy occurs on their shift. Employees are trained on the policy and the event reporting system.

35

40

If a nurse believes staffing is inadequate, pursuant to the event and government reporting policy, he or she is to raise the concern with the charge nurse and then move up the chain of command if the matter is not resolved. With regard to patient safety, nurses fill out a form of acuity each night. Respondent's event report form cannot be discovered in a medical malpractice suit or by the public

45

50

The Union has created an "assignment despite objection" (ADO) form upon which nurses can document assignments or situations they feel are not safe for the patient or may compromise the nurse's license. The Union provided the form to Respondent's nurses shortly after the election. Before filling out the ADO form, the nurse must first verbally notify her supervisor about the issue and give her a chance to address the issue. Once filled out, the nurse gives a copy of the form to her manager and a copy to the Union. There is a line on the form for the supervisor's response. The Union instructed the employees to also follow Respondent's policy. The ADO form is not protected from discovery.

Pursuant to an agreement prior to the Union's certification, the parties had agreed on some issues including retirement benefits, union security and recognition. These provisions were pre-negotiated before the election as to what the parties would agree to if the nurses selected the Union as their representative. The parties never executed this pre-election agreement. The agreement also provided for arbitration of all disputes.

5

10

15

20

25

30

35

40

45

50

The parties first met for bargaining on July 16, 2012. The meeting was introductory and took place at the hospital. The Union was represented by Stephen Mathews and three bargaining unit nurses. Respondent was represented by Don Carmody, attorney, and hospital administrator Jan Ellis. Mathews submitted an information request and the parties scheduled three dates for bargaining. During this meeting, Carmody stated that the Union needed to stop using the ADO forms. Mathews stated that the nurses would follow the Respondent's internal procedure as well as filling out the ADO forms.

On July 26, 2012, the parties met for bargaining. The Union presented its proposed contract with all its proposals except wages. Carmody stated he would not give any proposals or counter proposals until the Union provided all of its proposals. Mathews responded that Respondent was required to bargain and that its refusal to offer proposals or counter proposals was bad faith bargaining. Carmody responded that he had always bargained in this manner and was not going to change. Respondent did not offer any proposals or counter proposals.

On August 1, the parties again met for bargaining. Pursuant to the pre-certification unsigned agreement, the parties tentatively agreed to articles of the Union's proposed contract regarding recognition, union security and retirement benefits. Carmody again stated that he would make no proposals or counter proposals until the Union submitted all its proposals including its wage proposal. Mathews responded that Carmody was not bargaining in good faith. Carmody ended the meeting stating that he would make no responses until he obtained all of the Union's proposals.

On August 15, the parties again met for bargaining. The parties discussed the Union information requests. Mathews presented a document to show that ADO forms were used at the hospital in Watsonville, California. Carmody responded that it did not matter what occurred at other hospitals, Respondent would not accept the ADO forms. The meeting ended with Carmody refusing to make proposals or counter proposals until he received the Union's wage proposal.

During the last week of August, the Union learned that Respondent had changed its policy on how nurses could obtain training for their required certifications in basic life support, advanced cardiac life support and pediatric advance life support which must be renewed every 2 years. In fact, Respondent had made these changes in April, prior to the Union's election as bargaining representative.

On September 13, the parties again met for bargaining. The Union submitted a proposal to allow nurses to obtain their certification at any American Heart Association approved facility. Carmody said he was unable to contact Respondent's officials for an answer. Mathews asked for proposals or counterproposals. Carmody again responded that he would make no proposals or counter proposals until he had the Union's full contract proposal.

On September 26, the Union submitted its wage proposal to Jan Ellis. Carmody was not able to be present for this meeting. Ellis accepted the Union's proposal but stated that she had no authority to bargain at that time. Mathews stated that he Union wanted proposals or counter proposals. Ellis stated that she was there only to receive the wage proposal.

5

10

15

20

25

30

35

40

45

50

The parties next met on October 17, Mathews again requested proposals and counter proposals. Carmody discussed the Union's proposals for approximately 2 hours. Carmody said he would provide written counterproposals on a number of articles "at some point." Later that day, Carmody e-mailed to Mathews a grievance and arbitration proposal and a no strike/no lockout proposal.

Mathews opened the November 8 session by requesting Respondent to make proposals and counter proposals. Respondent caucused and then returned with four written proposals on posting and filling vacancies, sick leave, vacations and weekend rotation.

After a second caucus, Carmody offered four counterproposals on discharge and discipline, in-service and education, probation, and personnel records and evaluation. After a third caucus, Carmody presented three proposals on hours of work and overtime, holidays, and employee classifications. After a fourth caucus, Carmody offered two proposals covering non=discrimination and contract duration, and later provided proposals on management rights and the preamble, Carmody ended the meeting by stating he would offer six more written proposals at the next session.

At a bargaining session on November 14, the parties bargained about severability and employee classifications. They also bargained about hours of work and overtime, weekend rotations, and posting and filling vacancies.

On November 29, the parties negotiated over leaves of absence and evaluations and warnings. The parties also negotiated over non-discrimination, preamble, severability and general provisions. Carmody proposed the next session be scheduled for January and the Union objected. The parties finally agreed to meet on December 28.

At the December 28 meeting, the Union requested information about the pension plan and the parties discussed that subject. Carmody stated that the parties were at impasse over the use of the ADO forms. Mathews insisted that the parties were not at impasse. Carmody stated that the parties were at impasse on the ADO form and therefore were at impasse over every issue.

Carmody stated that the parties needed a mediator. Mathews denied the parties were at impasse but said he would not oppose mediation.

On December 28 and 31, Mathews sent Carmody e-mails stating that the parties were not at impasse and that the Union was willing to bargain over the issue of the ADO forms. Mathews stated that while there was no impasse, the Union would agree to the assistance of a federal mediator.

On January 11, 2013, the parties met with a federal mediator. The mediator shuttled back and forth between the parties who were in separate rooms. The mediator told the Union side that

Carmody took the position that the parties were at impasse over the use of the ADO forms and, therefore, were at impasse over everything. Mathews insisted the parties were not an impasse.

On January 14, 16, and 21, 2013, Mathews sent e-mails to Carmody requesting bargaining. However, Carmody did not respond. The parties did not meet again after the session with the federal mediator.

5

20

40

45

50

# Respondent's Defense

Respondent claims the existence of "an ad hoc" agreement between the Union and Respondent's parent corporation that requires all disputes be submitted to mandatory arbitration. Thus, Respondent argues that this case should be deferred to arbitration. Further, Respondent contends that the parties were at impasse when it refused to bargain. Respondent contends that it could lawfully request a full contract proposal before offering proposals of its own. Respondent further contends that the merger of the Union with the National Union of Healthcare Workers created discontinuity of representation privileging a refusal to bargain.

# III. Analysis and conclusions

### A. The Respondent Was Obligated to Bargain

to wages, hours and other terms and conditions of employment. " *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 344 (1958). The good faith requirement means that a party may not "negotiate" with a closed mind or decline to negotiate on a mandatory subject with a closed mind or decline to negotiate on a mandatory subject. "While Congress did not compel agreement between employers and bargaining representatives, it did require collective bargaining in the hope that agreements would result." *NLRB v, Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956). Sincere effort to reach common ground is of the essence is of the essence of good faith bargaining. *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 686 (9<sup>th</sup> Cir; 1943; *NLRB v. Reed & Prince Manufacturing Company*, 118 F. 2d 874, 885 (1<sup>st</sup> Cir. 1941) cert. denied 313 U.S. 595 (1941).

The quantity or length of bargaining does not establish or equate with good-faith bargaining. *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952). The Board will consider the "totality of the conduct" in assessing whether bargaining was done in good faith. *NLRB v. Suffield Academy*, 322 F.2d 196 (2d Cir. 2003).

During the bargaining from July to October, Carmody refused to offer proposals or counter proposals until the Union supplemented its bargaining proposals with its economic proposals. In MRA *Associates, Inc.* 245 NLRB 676, 677 (1979) the Board found that the failure to submit any proposals over the course of three bargaining sessions was evidence of "basic intransigence" on the employer's part designed to undermine the union's efforts to negotiate a contract. In *NLRB v. Arkansas Rice Growers Co-Op Assn.*, 400 F. 2d 565, 568 (8<sup>th</sup> Cir, 1968) the Court found that the single refusal to offer a counter proposal to the union's proposal regarding dues collection was not a per se violation. The Court enforced the Board's order. stating in relevant part, "Although as the Company suggests, it may not be bound to make

counter proposals, nevertheless, evidence of its failure to do so may be weighed with all other circumstances in considering good faith."

Respondent refused to bargain unless the Union agreed to stop using the ADO forms. 5 Respondent declared impasse over the Union's use of the ADO forms. The Union made no proposals for use of the ADO forms and denied an impasse existed. The Union expressed a willingness to bargain over the form or patient safety issues The Union never instructed nurses to bypass the Respondent's procedures. Rather the Union instructed the nurses to follow Respondent's policies in addition to using the ADO forms. In none of the bargaining sessions, 10 did either party make a proposal regarding the use of ADO forms, nor did they bargain over them.

The Board considers negotiations to be in progress, and thus will find no genuine impasse 15 to exist, until the parties are warranted in assuming that further bargaining would be futile or that there is "no realistic possibility that continuation of discussion . . . . would be fruitful." Saint-Gobain Abrasives, Inc., 343 NLRB 542 556 (2004).

The existence of impasse is a factual determination that depends on a variety of factors, including the contemporaneous understanding of the parties as to the state of negotiations, the good faith of the parties, the importance of the disputed issues, the parties' bargaining history, and the length of their negotiations. Taft Broadcasting Co., 163 NLRB 475, 478 (1967).

20

25

35

40

45

50

Section 8(a)(5) prohibits a party's insistence upon a permissible subject as a condition precedent to entering an agreement and precludes a good faith impasse. Borg-Warner Corp., 356 U.S. 342 at 347-49 (1958). Here, the Union continually offered to bargain about the proposals of the parties, as well as the ADO form. Respondent unlawfully refused to bargain unless the Union ceased using the ADO forms. While Respondent could lawfully refuse to 30 accept the ADO forms, it could not condition bargaining on the Union's abandonment of the ADO forms.

In this case, the Union argued that the parties were not at impasse. It is not sufficient for a finding of impasse to simply show that the Employer had lost patience with the Union. Impasse requires a deadlock. As the Board stated in *Powell Electrical Mfg.* Co., 287 NLRB 969, 973 (1987):

That there was no impasse when the Company declared is not to suggest that if the parties continued their sluggish bargaining indefinitely there would have been agreement on a new contract. Such a finding is not needed, nor could it be made without extra-record speculation, to find on this record that when the Company declared an impasse there was not one, even as far apart as the parties were. They had most of their work ahead of them, and judging by the opening sessions clearly had different goals in mind for a contract. Whether their differences ever would have been resolved cannot be known; but that is the nature of the process. It is for the parties through earnest, strenuous, tedious, frustrating and hard bargaining to solve their mutual problem—getting a contract together, not to quit the table and take a separate path.

Accordingly, I find that the parties were not at impasse when Respondent declared an impasse and refused to bargain unless the Union ceased using ADO forms.

JD(SF)-41-13

### B. Affiliation with National Union of Healthcare Workers

The National Union of Healthcare Workers affiliated with the Union effective January 1, 2013. Under the affiliation the two unions provide support to each other but each remains autonomous. The record shows that Union lent NUWH over \$1 million per month from January through April 2013. There is no evidence of any changes in the operations of the Union since the merger.

10

15

5

As the party asserting lack of continuity of representation, the Respondent has the burden of proof. *Sullivan Bros, Printers*, 317 NLRB 561, 562 (1995). In the context of an affiliation, the Respondent must "demonstrate that the affiliation resulted in changes that were sufficiently dramatic to alter the identity of the association, and thus, the substitution of an entirely different union as the employees' representative." *CPS Chemical Co.*, 324 NLRB 1018, 1020 (1997).

The only factor the Respondent can rely on is the change in the Union's finances. I find that Respondent has not met its burden of proof on this issue. The affiliation has not changed the Union's leadership, the manner in which it represents employees, or its day to day operations. The Union operates as an autonomous entity before and after the affiliation.

### C. There is no agreement to arbitrate this dispute.

25

30

20

Respondent contends that the Board should defer to arbitration. The Board has found deferral appropriate in instances where (1) the dispute arose within the confines of a long and productive bargaining relationship; (2) there is no claim of employer animosity to the employees' exercise of protected statutory rights; (3) the collective bargaining agreement's arbitration provision envisions a broad range of disputes; (4) the arbitration clause clearly encompasses the dispute at issue; (5) the employer indicates a willingness to utilize arbitration to resolve the dispute; and (6) the dispute is eminently well suited to such resolution. *Collyer Insulated Wire Co.*, 192 NLRB 837 (1971); *United Technologies Corp.*, 268 NLRB 557, 558 (1984).

35

Here the agreement to arbitrate was never signed by the parties. There has been no collective bargaining relationship between the parties. As there is no agreement between the parties, I cannot find an arbitration clause or an agreement to arbitrate. Accordingly, I find deferral to arbitration to be inappropriate.

40

#### CONCLUSIONS OF LAW

45

50

- 1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
  - 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. Respondent violated Section 8(a)(5) and (1) of the Act by refusing to offer proposals or counter proposals until the Union offered a full contract proposal.

- 4. Respondent violated Section 8(a)(5) and (1) by declaring impasse and refusing to bargain unless the Union ceased using ADO forms.
  - 5. Deferral to arbitration would be inappropriate in this case.

6. Respondent's conduct above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

10

15

20

30

35

40

45

5

Having found Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the purposes and policies of the Act. Accordingly, I shall order Respondent to resume collective bargaining with the Union. I shall order that the certification year be construed as beginning the date the Respondent begins to bargain in good faith with the Union pursuant to *Mar-Jac Poultry*, 136 NLRB 785 (1962)

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.<sup>1</sup>

#### **ORDER**

The Respondent, Hospital of Barstow, Inc, d/b/a Barstow Community Hospital, its officers, agents, successors, and assigns shall

- 1. Cease and desist from
- (a) Refusing to bargain collectively by insisting on a full contract proposal before offering proposals and counter proposals.
- (b) Refusing to bargain collectively by declaring impasse over a permissible subject of bargaining.
  - (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.
    - 2. Take the following affirmative action necessary to effectuate the policies of the Act.
  - (a) Upon request, meet and bargain with the Union as the exclusive collective-bargaining representative of its employees in the appropriate bargaining unit described below with respect to rates of pay, hours of employment, and other terms and conditions, and if an understanding is reached, embody such understanding in a signed agreement. The appropriate bargaining unit is:

If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

5

All full time, and part-time, and per diem Registered Nurses, including those who serve as relief charge nurses, employed by the Respondent at its 555 South Seventh Avenue, Barstow, California facility; excluding all other employees, managers, confidential employees, physicians, employees of outside registries, and other agencies supplying labor to the Respondent, already represented employees, guards and supervisors as defined in the Act, as amended.

(c) Within 14 days after service by the Region, post at its facility in Barstow, California

10

(b) The certification year be construed as beginning the date the Respondent begins to bargain in good faith with the Union pursuant to *Mar-Jac Poultry*, 136 NLRB 785 (1962)

15

copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since

25

September 26, 2012.

20

(d) Within 21 days after service by the Region, file with the Regional Director for Region 31, a sworn certification of a responsible official on a form provided by Region 31 attesting to the steps the Respondent has taken to comply herewith.

30

Dated, Washington, D.C. September 9, 2013

35

Jay R. Pollack Administrative Law Judge

40

45

 <sup>&</sup>lt;sup>2</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### **APPENDIX**

#### NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to bargain collectively by requiring a full contract proposal from the Union before making proposals or counter proposals.

WE WILL NOT refuse to bargain with the Union by insisting to impasse that the Union cease using ADO forms.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL upon request, meet and bargain with the Union as the exclusive collective-bargaining representative of our employees in the appropriate bargaining unit described below with respect to rates of pay, hours of employment, and other terms and conditions, and if an understanding is reached, embody such understanding in a signed agreement. The appropriate bargaining unit is:

All full time, and part-time, and per diem Registered Nurses, including those who serve as relief charge nurses, employed by the Respondent at its 555 South Seventh Avenue, Barstow, California facility; excluding all other employees, managers, confidential employees, physicians, employees of outside registries, and other agencies supplying labor to the Respondent, already represented employees, guards and supervisors as defined in the Act, as amended.

		HOSPITAL OF BARSTOW, INC. d/b/a BARSTOW COMMUNITY HOSPITAL  (Employer)	
Dated	Ву		
		(Representative)	(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

11150 West Olympic Boulevard, Suite 600, Los Angeles, CA 90064-1824 (310) 235-7352, Hours: 8:30 a.m. to 5 p.m.

#### THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (310) 235-7424.